

The Al-Sweady Public Inquiry

ANONYMITY AND OTHER SIMILAR PROTECTIVE MEASURES: VICTIMS' SUBMISSIONS ON THE APPROPRIATE LEGAL FRAMEWORK

Introduction

1. The Victims have been invited to provide written submissions in relation to the appropriate law to be applied by the Chairman when deciding applications for anonymity and other similar protective measures.

2. Specifically, the Victims have been invited to consider the following matters:

Issue 1: The legal test to be applied, and relevant considerations, in relation to any application that relies on articles 2 or 3 of the ECHR.

Issue 2: The legal test to be applied, and relevant considerations, in relation to any application that asserts that there is a risk of death or injury, but where articles 2 and 3 of the ECHR are not relied on (the so-called “common law test”).

Issue 3: The legal test to be applied, and relevant considerations, in relation to any application that relies on article 8 of the ECHR.

Issue 4: The legal test to be applied, and relevant considerations, in relation to so-called “public interest” applications for protective measures.

Each of the highlighted Issues will be considered in turn below.

3. It is understood that the Chairman may wish to consider the generic issues that may arise when determining applications for anonymity, and other similar protective measures, at the Directions Hearing timetabled for 21 (and if necessary 28 June) 2010. Due to various logistical constraints, these submissions have been prepared on behalf of the Victims without the assistance of lead counsel. If the Chairman is minded to hear

further submissions on these issues in due course, the Victims respectfully request the opportunity to expand upon the arguments set out herein.

Over-Arching Legal Framework

4. The Chairman's power to grant anonymity, and other similar protective measures is derived from the Inquiries Act 2005, informed by the Human Rights Act 1998 and common law.

5. Section 17 (Evidence and procedure) of the Inquiries Act 2005 provides:

- (1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
- (2) ...
- (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).

6. Section 18 (Public access to inquiry proceedings and information) provides:

(1) Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—

(a) ...

(b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

(2) No recording or broadcast of proceedings at an inquiry may be made except—

(a) ...

(b) with the permission of the chairman and in accordance with any terms on which permission is given.

Any such request or permission must be framed so as not to enable a person to see or hear by means of a recording or broadcast anything that he is prohibited by a notice under section 19 from seeing or hearing.

(3) ...

(4) ...

7. Section 19 (Restrictions on public access etc) provides:

(1) Restrictions may, in accordance with this section, be imposed on—

(a) ...

(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.

(2) Restrictions may be imposed in either or both of the following ways—

(a) ...

(b) by being specified in an order (a “restriction order”) made by the chairman during the course of the inquiry.

(3) A restriction notice or restriction order must specify only such restrictions—

(a) ...

(b) as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4).

(4) Those matters are—

(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;

(b) any risk of harm or damage that could be avoided or reduced by any such restriction;

(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;

(d) the extent to which not imposing any particular restriction would be likely—

(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or

(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

(5) In subsection (4)(b) “harm or damage” includes in particular—

(a) death or injury;

(b) ...

(c) ...

(d) ...

8. Breaches and threatened breaches of restriction orders and other orders made by an inquiry Chairman may be certified by the Chairman to the High Court for enforcement: section 36.
9. The Chairman, as a public authority within the meaning of the Human Rights Act 1998, is obliged to act compatibly with Convention rights, including Articles 2, 3 and 8 of the European Convention on Human Rights. All of these articles are capable of imposing an obligation on a public authority to take positive steps to prevent the interests protected by those articles from being damaged by non-state actors or forces, and are capable themselves of forming the basis for jurisdiction to restrain publicity: see *In re S* [2005] 1 AC 593 at para. 23.

Issue 1: Articles 2 and 3 of the ECHR

10. Article 2 includes a positive obligation on State authorities to take steps to safeguard life: see *Osman v UK* (1998) 29 EHRR 245. In that case, the European Court set out the necessary circumstances for a violation of this duty to arise (at 116):

... it must be established to [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

11. The leading authority on the application of Article 2 in the context of witness anonymity is *In re Officer L* [2007] 1 WLR 2135, where the House of Lords held that a 'real and immediate' risk was one that was objectively well-founded and present and continuing (see para. 20). Once that threshold was crossed, the authorities must take all reasonable steps to avoid that risk. The reasonableness of steps involves consideration of the ease or difficulty of taking precautions and the resources available (see para. 21) but not, in the submission of the Victims, wider public interest considerations (see *Application by Guardian News and Media Ltd* [2010] UKSC 1 at para. 27).
12. Equally, whilst the degree to which information about a witness is already in the public domain may be relevant in considering whether the publicity in connection with the proceedings will lead to any increased risk to the witness, it is submitted that once such a risk is established, the fact that some information about the witness is already in the public domain cannot be an automatic bar to the grant of anonymity. If the risk to life passes the 'real and immediate' threshold, it would ordinarily be reasonable to give the witness a degree of anonymity (see *Officer L* at para. 29).
13. The UK authorities are, by virtue of Articles 2 and 3, required to hold an effective official investigation into violations of the Victims' rights under Articles 2 and 3 by agents of the UK. Were that official investigation to *itself* place the victims of the original Articles 2 and 3 violations at a real, immediate and avoidable risk of losing their lives or suffering torture or inhuman treatment, it could hardly constitute an effective investigation.

Issue 2: Common law test

14. The approach advocated by case-law under the Convention is equally applicable within the common law (and thus within the statutory framework under the 2005 Act), although a much wider range of considerations may also come fall to be considered: see *Officer L* at para. 22.
15. The common law requirement that tribunals act in a procedurally fair manner includes an obligation to be fair to witnesses, including protecting them where necessary. The demands of fairness will depend on all the circumstances of the case and will include consideration of others involved in the proceedings and the public interest, but requiring witnesses to undergo an unnecessary risk will be unfair: see *R v Lord Saville of Newdigate, ex p. A* [2000] 1 WLR 1855 at paras. 38-40 and para. 44. To require witnesses to face a real and immediate risk to their lives or their freedom from torture or inhuman treatment when steps could reasonably be taken to avoid this is clearly unnecessary and unfair, as it is to require witnesses to undergo a disproportionate incursion into their freedom and their private and family lives as they see fit.
16. It is submitted that the appropriate test to apply is that set out by Lord Carswell in *In re Officer L* as explained in the decision of the Northern Ireland Court of Appeal in *In re A and Others Application* [2009] NICA 6.
17. In *In re Officer L* (at para. 29) Lord Carswell suggested a combined test:

In pursuit of this end, I suggest that the exercise to be carried out by the tribunal faced with a request for anonymity should be the application of the common law test, with an excursion, if the facts require it, into the territory of article 2. Such an excursion would only be necessary if the tribunal found that, viewed objectively, a risk to the witness's life would be created or materially increased if they gave evidence without anonymity. If so, it should decide whether that increased risk would amount to a real and immediate risk to life. If it would, then the tribunal would ordinarily have little difficulty in determining that it would be reasonable in all the circumstances to give the witnesses a degree of anonymity. That would then conclude the exercise, for

that anonymity would be required by article 2 and it would be unnecessary for the tribunal to give further consideration to the matter. If there would not be a real and immediate threat to the witness's life, then article 2 would drop out of consideration and the tribunal would continue to decide the matter as one governed by common law principles. In coming to that decision the existence of subjective fears can be taken into account on the basis which I earlier discussed (see para. 22).

18. In *In re A and Others Application* all three members of the court rejected any suggestion that Lord Woolf in *R v Lord Saville of Newdigate ex p. A* propounded a rule of general application that 'compelling justification' was required before anonymity could be refused where a risk to life arose. Kerr LCJ (at para. 24) stated:

I am of the view that a risk falling short of that required to activate Article 2 of the ECHR falls to be assessed simply as one of a number of factors in an even handed evaluation of competing interests rather than as a matter which requires to be offset by compelling justification.

19. In *In re A* Girvan LJ held that Lord Woolf's dicta in "*ex p. A*" must be seen in 'its proper factual context and not read as "... stating a broad overriding principle that the common law duty of fairness in any case where a claimed risk to life and subject fears arise requires that anonymity should be granted in the absence of compelling reasons". Girvan LJ (at para. 23) set out the test to be applied:

How the balance is struck in individual cases will, of course, be fact specific. Where there is a risk to the life of a witness the extent of the risk is a highly relevant factor to be put into the scales. Common sense and humanity would lead to the conclusion that the greater the risk the more persuasive the case for anonymity and the more the court would have to be persuaded that the countervailing factors are even more persuasive so as to lead to a refusal of anonymity or, in the words of Lord Woolf, there would have to be some compelling reason for refuse anonymity. Using the terminology in *ex parte Brind* [1991] AC 969 there would have to be a compelling public interest of sufficient importance to justify withholding anonymity.

Issue 3: Article 8

20. The right to respect for private and family life within Article 8 of the European Convention may also require measures to protect anonymity or restrict the reporting of personal information: see for example, *Craxi (No. 2) v Italy* (2004) 38 EHRR 47 and *X (woman formally known as Mary Bell) v SO* [2003] 2 FCR 686.
21. In *Application by Guardian News and Media Ltd* [2010] UKSC 1, Lord Rodger, giving the judgment of the Court, stated (at para. 29) that the power to make anonymity, and other such orders, ‘is one of the ways that the United Kingdom fulfils its positive obligations under article 8 of the Convention to secure that other individuals respect an individual’s private and family life.’ Reference was made to *Von Hannover v Germany* (2005) 40 EHRR 1, 25, para. 57, in which the European Court of Human Rights reiterated that:

although the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves

The boundary between the State’s positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be struck between the competing interests of the individual and the community as a whole . . .

22. The principles in respect of Article 8 rights and the interplay between Article 8 and Article 10 are summarized by Lord Steyn in *In re S (a child) (Identification restrictions on publication)* 1 AC 593 in paragraph 17 of his Opinion. They are:

First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict an intense focus on the

comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the balancing test.

23. Further consideration of the appropriate approach when Article 8 and Article 10 are both in play is set out in *Application by Guardian News and Media Ltd* (paras. 43-52). Lord Rodger cited the guidance provided by the European Court in *Von Hannover v Germany*. He stated (at para. 49):

The European Court recalled, at p. 25, para. 58, that “the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest ...”. Hence “in cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest ...” (p. 25, para. 60). The decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest (p. 28, para. 76). But, where publication of the photographs and articles was simply intended to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, it could not be deemed to contribute to any debate of general interest to society. In that situation freedom of expression called for a narrower interpretation (p. 27, paras. 65 and 66).

24. Lord Rodger, recalling Lord Steyn’s statement that “neither article [8 or 10] has *as such* precedence over the other” (in *Re S* above), held (at para. 51) that:

the weight to be attached to the rival interests under articles 8 and 10 – and so the interest which is to prevail in any competition – will depend on the facts of the particular case. In this connexion it should be borne in mind that – picking up the terminology used in the *Von Hannover* case – the European Court has

suggested that, where publication concerns a question “of general interest”, article 10(2) scarcely leaves any room for restrictions on freedom of expression: *Petrina v Romania* (application no 78060/01, 14 October 2008, para. 40)

Issue 4: The Public Interest

25. The rights of the press under Article 10 of the European Convention to receive and impart information are an important consideration. The comparative importance of the competing rights must be examined and the justifications for interfering with each right and the proportionality of doing so must be considered: see *In re S* [2005] 1 AC 593 and *Application by Guardian News and Media Ltd* [2010] UKSC 1 (at para. 27 regarding Articles 2 and 3 and 43-52 regarding Article 8).
26. Article 10 of the Convention includes not only the rights of the press and others to impart information which has been received, but also a right to *receive* information, held by the public more generally. It is accepted that measures proposed under Article 8 which restrict the evidence presented in the Inquiry room (where members of the public and press are entitled to be present) raise issues under Article 10 which should be taken into account by the Chairman in determining whether any interference with Article 8 rights of witnesses is justified, following the approach in *In re S* and *Application by Guardian News and Media Ltd* (above).

Public servants/officials

27. Different considerations may apply to the impact of the public interest in knowing the identity of public servants to knowing the identity of a victim. In the Robert Hamill Inquiry applications for anonymity on the part of police officers were refused on the grounds that such anonymity would constitute an unacceptable inroad into the openness of the proceedings. The reasoning of the tribunal was heavily based on the consideration that unease about the conduct of the police had led to the setting up of the Inquiry and that, as Counsel to the Inquiry stressed, to grant the officers’ applications would be to anonymise “the very people whose actions the Inquiry was

designed to illuminate” (see Ruling on anonymity applications made at the oral hearing on 15-16 May 2006).

28. Similar considerations can be seen in cases dealing with requests for anonymity on behalf of criminal defendants or those suspected of unlawful killing in inquest proceedings (see *In re S*, and *Re LM* [2007] EWHC 1902 (Fam)), and contrasted with the significantly more common grant of anonymity to the victims of unlawful acts (such as victims of rape or blackmail in the criminal courts). The Victims are not the persons whose actions this Inquiry is designed to illuminate and are in a significantly different position to such persons.
29. The panel in the Robert Hamill Inquiry also emphasised that police officers are public servants with extraordinary powers not granted to ordinary citizens and exercised in order to maintain the rule of law and assist in the administration of justice, and accepted the submission that it was not in the public interest that such powers be exercised anonymously. This is clearly correct: the role of a public servant necessarily carries with it a degree of public accountability, publicity constituting a powerful deterrent to abuse of power. The Victims are not public servants who were exercising public powers at the time of the incidents to which this Inquiry relates. There is a distinction to be drawn between public servants and victims in that victims have not voluntarily accepted the degree of public scrutiny that public office involves.
30. It follows that the balancing exercise between any established risk to public servants and the public interest in such witnesses giving their evidence without protection is likely to result in the latter consideration being granted more prominence.
31. The task of the Inquiry is to conduct as transparent an investigation as possible into the matters under consideration, in order to fulfil its key purposes which include uncovering the truth, maintaining public confidence in the Inquiry process and its findings, and facilitating the accountability of those involved and justice for the victims. The achievement of these aims will be significantly impeded if public officials are granted excessive protection.

Public Confidence

32. Public perception of the impartiality of public inquiries and the effectiveness of their processes is vital to their success, and particularly to the acceptance of any findings and recommendations that may be made at their conclusion. In order for the public to have confidence in the Inquiry and its results they need to be able to fully understand the oral hearings, written evidence and the Chairman's final report. The concealment of the identities of key participants, such as those in public office, will make each of these elements more difficult to follow.
33. Furthermore, public confidence in the impartiality of the Inquiry process is likely to be heavily dented if the public are given the impression that the Inquiry is shielding from scrutiny those responsible for abuse and unlawful acts. The views of the tribunal in the Robert Hamill Inquiry in this regard are instructive:

In our view to offer the cloak of secrecy, when unease about the conduct of the police has led to the setting up of this Inquiry, would make an unacceptable inroad into the openness of our proceedings and give rise to doubts among a significant proportion of the populace about our impartiality. As Counsel to the Inquiry cogently puts it in his first submission: 'If the Inquiry were to anonymise, or screen, the very people whose actions the Inquiry was designed to illuminate, it would serve to undermine public confidence in the process.'

34. To conceal the identities of those in public office would indeed be to offer the cloak of secrecy to the very people whose actions this Inquiry was designed to illuminate. In order for the public to have confidence in the Inquiry process they must be able to scrutinize and assess the evidence for themselves. Again, the words of the Robert Hamill Inquiry tribunal are apt:

To put it bluntly, it simply would not wash with the public, and rightly so, to tell them that the members of the Panel know and the Secretary of State knows who behaved badly, if anyone did, but that they do not need to know.

35. The events under scrutiny in this Inquiry are of the utmost importance and interest to the public. They involve the acts of British soldiers, who are in many respects ambassadors of the British public when they are on operations abroad. Not all members of the public who are interested in the matters under consideration in the inquiry will be able to attend every day of the Inquiry's hearings (in fact very few will be). Many may have difficulty in keeping tabs on the evidence through the Inquiry's website. The vast majority will rely upon press reporting of the Inquiry proceedings to follow what is revealed in the hearing room and in documentary evidence, and the full and accurate reporting of this is crucial to the maintenance of public confidence in the Inquiry. Yet if the names and faces of key participants in the events cannot be published, the press function is likely to be significantly affected. As Lord Steyn explained in *Re S* [2005] 1 AC 593 at para. 34:

It is more important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be very much a disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence and editors will act accordingly. Informed debate about criminal justice will suffer.

36. Whilst Lord Steyn was referring in this passage to criminal trials, his analysis is equally applicable to a public inquiry, and particularly one such as this Inquiry, where the allegations to be examined are of conduct which is both criminal (in substance) and highly shocking. Informed debate about the conduct of British forces in Iraq will indeed suffer if the identity of key public officers is kept secret from the public.

Accountability

37. As stated above, a key function of a public inquiry is to facilitate the accountability of public servants to the public. That accountability is particularly imperative where the alleged conduct of the public servants in question is of the most serious kind. Press freedom and the transparent administration of justice are particularly weighty considerations when applicants for anonymity are in the position of persons accused of serious wrongdoing, akin to that of criminal defendants: see *Re S* [2005] 1 AC 593 at paras. 28-31 and *Re LM* [2007] EWHC 1902 (Fam) at para. 54.

38. An essential check on the human potential to abuse power or otherwise act in a wrongful manner is the knowledge that, if discovered, one will have to stand public scrutiny and face the criticism and condemnation of one's peers, family and the public at large, and will have to suffer the resultant damage to one's reputation and career. That this check should operate effectively is especially important in the case of public servants such as the military, who exercise extraordinary powers not granted to ordinary citizens and who must, as a corollary, accept a degree of public accountability for their actions in such roles. As noted in *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 126 (per Lord Steyn), freedom of speech acts as a brake on the abuse of power by public officials.
39. To remove that brake in these proceedings would not only prevent the Inquiry fulfilling its aim of rendering British soldiers accountable for the wrongs they inflicted, it would also risk sending a message that other soldiers and other public servants may expect to be shielded from scrutiny and criticism in the future.
40. Finally, it is important that public scrutiny is contemporaneous and on-going throughout the Inquiry process. Continuous scrutiny is important to ensure the ability of the Inquiry to arrive at the truth and maintain public confidence in the process. In *Re S* [2005] 1 AC 593, which involved a proposed injunction to prevent the disclosure of the identity of a criminal defendant who had poisoned her child, Hale LJ (as she then was) had suggested in the Court of Appeal that it would be appropriate for the mother's identity to be concealed until after any conviction, because there was a greater public interest in knowing the names of persons convicted of serious crime than in knowing the names of those who are merely suspected or charged. Lord Steyn (with whose judgment all other members of the House of Lords agreed) said this in response, at 607:

I cannot accept these observations without substantial qualification. A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be

as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

While these observations were made in the context of a criminal trial, there is no reason why they should not apply equally to this Inquiry.

Suggested Approach

41. It is submitted that the relevant questions for the Chairman, in light of the above legal framework, are as follows:

- (i) Without the orders sought, what will be the likely effect of participation in the Inquiry on the witness?
- (ii) Will there be a material increase in the risk to the lives of the applicant witness, or their freedom from torture or cruel, inhuman or degrading treatment? Such an increase in risk may result from an increased and more widespread publication of the identities of the witness, even if their identities are, to a more limited extent, already in the public domain: see for example, *Venables & Thompson v News Group Newspapers* [2001] 1 Fam 430 at paras. 102 and 105.
- (iii) If yes, does such an increased risk amount to a real and immediate risk – i.e. one that is objectively verified and present and continuing?
- (iv) If yes, are the measures sought by the applicant witness reasonably required in light of that risk, considering the ease/difficulty and cost of the measures sought?
- (v) If there is no increased risk to life or freedom from torture or inhuman treatment or such risk does not cross the ‘real or immediate’ threshold, the

Chairman should go on to consider whether or not the measures sought should nevertheless be granted, by balancing all relevant considerations including those against them, *inter alia* matters specified in section 19(4) of the Act. Relevant considerations in favour of granting anonymity or other protective measures may include the subjective fears of witnesses for their lives and the risk of harm or damage that they may suffer other than risk to their lives, including incursions on their private life (balanced, of course, against the public interest and Article 10 of the Convention).

PUBLIC INTEREST LAWYERS

2 June 2010